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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 JUAN ESBER MANZUR,)
11 vs.) Plaintiff,)
12)
13 STEPHEN K. MONTOYA, *et al.*,)
14) Defendants.)
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Case No. 2:07-cv-00603-JCM-GWF

**FINDINGS AND
RECOMMENDATIONS**

16 On May 7, 2007, Plaintiff brought a civil rights suit against Stephen K. Montoya, M.D.,
17 President of the Nevada State Board of Medical Examiners (the “Board”), and Warden Neven, as
18 Warden of High Desert State Prison. On July 3, 2007, District Judge James C. Mahan dismissed Court
19 II of Plaintiff’s complaint for failure to state a claim and dismissed any and all claims against Warden
20 Nevens. Plaintiff was allowed to proceed in Count I of his complaint against Defendant Montoya.

21 On February 8, 2008, Magistrate Judge George Foley, Jr. denied Plaintiff’s Motion to Change
22 Named Defendant Montoya to Nevada State Board of Medical Examiners (#28) and ordered Plaintiff to
23 submit a proposed amended complaint identifying all parties and claims for relief in this action.

24 On February 20, 2008, Plaintiff filed his Amended Complaint (#51) naming the President of the
25 Nevada State Board of Medical Examiners, as head of the Board and in his official capacity, and the
26 Board members John Does (I through X), in their individual capacities, as defendants.

27 On March 3, 2008, Defendant Montoya filed his Motion to Stay Proceedings Pending Screening
28 of Amended Complaint (#55).

BACKGROUND

In his original civil rights suit, Plaintiff alleges that on June 3, 2005, Stephen K. Montoya, M.D., then President of the Board, acting under color of state law, violated his constitutional right of procedural due process by illegally revoking his medical license. Plaintiff alleges that under NRS 630, Defendant Montoya is prohibited from revoking Plaintiff's medical license based on Plaintiff's felony convictions and arrest. Plaintiff further alleges that the Board misrepresented facts by finding that Plaintiff: (1) committed "medical disreputable offenses," (2) suffers from a mental condition as a result of drugs and alcohol addiction, (3) tested positive for amphetamines and that such testing was never performed, and (4) was never informed of the June 3, 2005 meeting to revoke Plaintiff's medical license and further impeded Plaintiff's due process defense because the Board's official stance was announced by a Board official to a Las Vegas news channel. Plaintiff further alleges that the Board's actions to revoke his medical license was in bad faith because Plaintiff was not informed of the meeting to revoke his medical license and was led to believe that his medical license was not in jeopardy.

In his amended complaint, Plaintiff asserts that the President of the Board and the Board members violated his Fifth and Fourteenth Amendment due process rights of property protection by revoking his medical license. Plaintiff further alleges that the President of the Board and the Board members are continuing to violate his procedural due process rights by not returning his medical license to him.

Plaintiff also asserts in his amended complaint that the President of the Board and the Board members violated and continue to violate his Fourteenth Amendment right to equal protection under the law by the “continued taking” of Plaintiff’s medical license.

DISCUSSION

I. Absolute Immunity

“Absolute immunity is generally accorded to judges and prosecutors functioning in their official capacity.” *Olsen v. Idaho State Bd. Of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004) (citing *Stump v. Sparkman*, 435 U.S. 349, 364, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978); *Imbler v. Pachtman*, 424 U.S. 409, 430-31, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976)). “This immunity reflects that long-standing ‘general principle of the highest importance to the proper administration of justice that a judicial officer, in

1 exercising the authority vested in him, shall be free to act upon his own convictions, without
 2 apprehension of personal consequences to himself.”” *Olsen*, 363 F.3d at 922 (quoting *Bradley v. Fisher*,
 3 80 U.S. 335, 13 Wall. 335, 347, 20 L.Ed.646 (1871)); *see also Mishler v. Clift*, 191 F.3d 998, 1003 (9th
 4 Cir. 1999) (“The essential rationale is that, without protection from retaliatory suits, a judge would lose
 5 ‘that independence without which no judiciary can be either respectable or useful.’ A prosecutor’s
 6 entitlement to absolute immunity flows from the performance of activities that are intimately associated
 7 with the judicial process.”)

8 “The Supreme Court has also held that executive branch officials, when participating in a
 9 federal administrative agency’s adjudicative process, are entitled to absolute immunity because they
 10 perform functions comparable to those of judges and prosecutors.” *Id.* (citing *Butz v. Economou*, 438
 11 U.S. 478, 512-13, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978)).

12 *Butz* held that the role of a hearing examiner in a federal agency was ““functionally comparable”
 13 to that of a judge.” 438 U.S. at 513. “The *Butz* Court also held that agency officials performing
 14 functions analogous to those of prosecutors would be entitled to absolute immunity.” *Id.* *Butz* noted
 15 that the “decision to initiate administrative proceedings against an individual or corporation is very
 16 much like the prosecutor’s decision to initiate … criminal prosecution.” *Id.* at 515.

17 “[C]ourts have extended the protections of absolute immunity to qualifying state officials sued
 18 under 42 U.S.C. § 1983. *Olsen*, 363 F.3d at 923 (citing *Miller v. Gammie*, 335 F.3d 889, 895-96 (9th
 19 Cir. 2003) (explaining that though § 1983 does not include a defense of immunity, “the Supreme Court
 20 has recognized that when Congress enacted § 1983, it was aware of a well-established and well-
 21 understood common-law tradition that extended absolute immunity to individuals performing functions
 22 necessary to the judicial process” (citing *Forrester v. White*, 484 U.S. 219, 225-26, 108 S.Ct. 538, 98
 23 L.Ed.2d 555 (1988) (superseded by statute)); *Buckley v. Fitzsimmons*, 509 U.S. 529, 268-69, 113 S.Ct.
 24 2606, 125 L.Ed.2d 209 (1993)).

25 The Supreme Court has never addressed the issue; however, two Ninth Circuit decisions have
 26 held that state medical boards and their officers enjoy absolute immunity for the non-ministerial acts
 27 that they commit in performing their duties. *Yoonessi v. Albany Medical Center*, 352 F.Supp.2d 1096,
 28 1100 (C.D. Cal. 2005).

1 In *Mishler v. Clift*, the Ninth Circuit held that the members of the Nevada State Board of
 2 Medical Examiners are entitled to absolute immunity for their ministerial acts. 191 F.3d at 1009.
 3 *Mishler* was in accord with “well-established case law holding that medical board officials entitled to
 4 absolute immunity for their quasi-judicial and quasi-prosecutorial functions.” *Olsen*, 363 F.3d at 923.
 5 (citing *Wang v. New Hampshire Bd. of Registration in Med.*, 55 F.3d 698, 702 (1st Cir. 1995) (holding
 6 that medical board’s counsel entitled to absolute immunity for investigation surrounding disciplinary
 7 complaint); *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1490-91 (10th Cir. 1991) (same);
 8 *Bettencourt v. Bd. of Registration in Med.*, 904 F.2d 772, 782-83 (1st Cir. 1990) (holding that board
 9 officials are absolutely immune from suit by physician whose license was revoked); *Horwitz v. State*
 10 *Bd. of Med. Exam’rs*, 822 F.2d 1508, 1515 (10th Cir. 1987) (holding that medical board members are
 11 entitled to absolute immunity)); *Yoonessi*, 352 F.Supp.2d at 1102-03 (holding that medical board
 12 officials are absolutely immune from suit by physician whose license was revoked). “Functions
 13 discussed in these cases include investigating charges, initiating charges, weighing evidence, making
 14 factual determinations, and issuing written decisions.” *Mishler*, 191 F.3d at 1004.

15 In *Olsen v. Idaho State Board Bd. of Medicine*, 363 F.3d at 928-29, the Ninth Circuit relied on
 16 *Mishler* and held that the Idaho State Board of Medical Examiners and its members could not be sued
 17 for the quasi-judicial and quasi-prosecutorial actions they took while adjudicating a disciplinary
 18 dispute. *Yoonessi*, 352 F.Supp.2d at 1100.

19 Here, Plaintiff’s allegations against Defendant Montoya relate to his official capacity as
 20 President of the Board. Defendant Montoya’s alleged action of revoking Plaintiff’s medical license is a
 21 quasi-judicial or quasi-prosecutorial function. Furthermore, Defendant Montoya’s alleged findings that
 22 Plaintiff (1) committed “medical disreputable offenses,” (2) suffers from a mental condition as a result
 23 of drugs and alcohol addiction, and (3) tested positive for amphetamines are quasi-judicial findings.
 24 The Court finds that absolute immunity applies to the quasi-judicial actions that Defendant Montoya
 25 committed while he was serving as President of the Board. Thus, Defendant Montoya is entitled to
 26 absolute immunity.

27 **II. Scope of Absolute Immunity**

28 In *Mishler*, the Ninth Circuit held that “the protections of absolute immunity reach only those

1 actions that are judicial or closely associated with the judicial process.” 191 F.3d at 1007 (citing
 2 *Buckley v. Fitzsimmons*, 509 U.S. 259, 273, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993) (“A prosecutor’s
 3 administrative duties and those investigatory functions that do not relate to an advocate’s preparation of
 4 the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity.”) Thus,
 5 the Ninth Circuit in *Mishler* held that acts committed during the disciplinary hearing process fall within
 6 the scope of absolute immunity; “holding hearings, taking evidence, and adjudicating are functions that
 7 are inherently judicial in nature.” *Id.* at 1008. In *Olsen*, the Ninth Circuit held that acts intimately
 8 related to the a Board member’s adjudicatory role in licensing physicians are likewise entitled to
 9 absolute immunity. 363 F.3d at 928. (citing *Horwitz v. Bd. of Medical Exam’rs*, 822 F.2d 1508, 1515
 10 (10th Cir. 1987) (accordng absolute immunity to members of boards exercising authority to summarily
 11 suspend professional licenses)).

12 In contrast, ministerial acts that are not “closely associated with the judicial process ... fall
 13 outside the protections of absolute immunity.” *Mishler*, 191 F.3d at 1008. In *Mishler*, the Ninth
 14 Circuit did not apply absolute immunity to a Nevada Board member’s failure to respond to inquiries
 15 from the Ohio Board of Medical Examiners. *Id.* The Ninth Circuit held in *Mishler* that the board
 16 member’s failure to act constituted an administrative function entailing examination of records and
 17 sending of correspondence was outside the protections of absolute immunity. *Id.* The Ninth Circuit in
 18 *Olsen* did not apply absolute immunity to acts pertaining to a state medical board’s billing practices.
 19 363 F.3d at 929.

20 Plaintiff’s allegations that the President of the Board and the members of the Board illegally
 21 revoked his medical license and continue to “take” his medical license involve only actions closely
 22 related to the their respective roles in a quasi-judicial or quasi-prosecutorial process. Plaintiff’s
 23 allegations that the President of the Board and the members of the Board misrepresented facts by
 24 finding that Plaintiff: (1) committed “medical disreputable offenses,” (2) suffers from a mental
 25 condition as a result of drugs and alcohol addiction, (3) tested positive for amphetamines and that such
 26 testing was never performed, and (4) was never informed of the June 3, 2005 meeting to revoke
 27 Plaintiff’s medical license and further impeded Plaintiff’s due process defense because the Board’s
 28 official stance was announced by a Board official to a Las Vegas news channel cannot be classified as

1 ministerial or administrative in nature. Rather, the President of the Board and the members of the
 2 Board are related to their decision to revoke Plaintiff's license, which are quasi-judicial or quasi-
 3 prosecutorial in nature. Thus, their acts are entitled to absolute immunity.

4 **III. Amended Complaint**

5 In Plaintiff's Amended Complaint (#51), Plaintiff requests to join the members of the Board as
 6 Defendants. For the foregoing reasons, the Board is entitled to absolute immunity. The Court finds
 7 that Plaintiff cannot amend his complaint to state a viable cause of action against Defendant Montoya.
 8 The Court has already afforded Plaintiff one (1) opportunity to amend his complaint as to Defendant
 9 Montoya. Because Plaintiff's Amended Complaint (#51) states the same facts as Plaintiff's original
 10 complaint and offers no other relevant facts to support his claims, the Court finds that allowing an
 11 opportunity to amend the complaint against the President of the Board and the members of the Board
 12 would be futile. No matter how many times or ways in which Plaintiff attempts to amend his
 13 complaint, the Board's actions will always be subject to absolute immunity. *Yoonessi*, 352 F.Supp.2d
 14 at 1104. The Court further finds that Plaintiff cannot amend his complaint to state a viable cause of
 15 action against any of these Defendants as the Board's actions as stated in Plaintiff's complaint are
 16 entitled to absolute immunity. Accordingly,

17 **IT IS HEREBY RECOMMENDED** that Plaintiff's Civil Rights Complaint Pursuant to 42
 18 U.S.C. § 1983 (#1) should be **dismissed** based on Plaintiff's failure to state a claim upon which relief
 19 may be granted.

20 **IT IS FURTHER RECOMMENDED** that Plaintiff's Amended Civil Rights Complaint
 21 Pursuant to 42 U.S.C. § 1983 (#51) should be **dismissed** based on Plaintiff's failure to state a claim
 22 upon which relief may be granted.

23 **NOTICE**

24 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be in
 25 writing and filed with the Clerk of the Court within ten (10) days. The Supreme Court has held that the
 26 courts of appeal may determine that an appeal has been waived due to the failure to file objections
 27 within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also held that (1)
 28 failure to file objections within the specified time and (2) failure to properly address and brief the

objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

DATED this 20th day of March, 2008.

George Foley, Jr.
GEORGE FOLEY, JR.
UNITED STATES MAGISTRATE JUDGE